FILED
AUG 30 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-194 / 89-545

IN RE THE MARRIAGE OF MARLYS BERN AND HAROLD BERN

Upon the Petition of

MARLYS BERN,

Appellee,

And Concerning,

HAROLD BERN,

Appellant.

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Appeal from the Iowa District Court for Tama County, Van D. Zimmer, Judge.

Husband appeals the economic provisions of the district court's decree of dissolution of marriage. **AFFIRMED AS MODIFIED.**

Donald G. Juhl, Nevada, for appellant.

Susan S. Klaessy of Fairall, Fairall, Kaplan, Hoglan & Condon, Marshalltown, for appellee.

Considered by Oxberger, C.J., and Hayden and Habhab, JJ.

HAYDEN, J.

Harold and Marlys Bern were married on June 3, 1950. At time of trial, Marlys was sixty years of age and Harold was sixty-two. The parties had three children, all of whom are now adults. Harold is employed as a union carpenter, and earns approximately fifteen dollars per hour, or $1,511 per month. Harold plans to retire on his sixty-fifth birthday on August 26, 1991. Marlys has worked in a variety of jobs, including a veterinarian's office, and as a waitress. Marlys reported income of $2,200 in 1988.

Neither party brought any substantial property into the marriage. The Berns purchased the present marital home in 1960 by mortgaging the home to Marlys's sister and husband. Several years later, Marlys inherited $30,000, which was to be received in installments of $5,000 per year from 1964 through 1969. The inheritance was used to help pay off the original loan on the house and to remodel it extensively. The money was also used for living expenses and to purchase motor vehicles.

Marlys filed the present action on June 3, 1988, by filing a petition for separate maintenance. Harold answered on June 20, 1988, and prayed for a dissolution of marriage. Trial was held on February 22, 1989.

Following trial, the district court entered its decree, ordering Harold to pay Marlys $500 per month alimony. The court awarded Marlys equity of $6,906 in the homestead, the parties' 1978 Ford automobile valued at $1,250, a

twenty-one-foot Holiday travel trailer at $1,450, the household furniture valued at $3,250, painting equipment valued at $120 used in Marlys's contract painting business, the state income tax refund of $469, and $600 in bank accounts, for a total of $14,045. Harold was awarded the parties' 1980 pickup valued at $700, a boat, motor, and trailer valued at $345, $410 in household furnishings, $1,320 in carpenter tools, and $250 in bank accounts, for a total of $3,025. Harold now appeals.

His appeal concerns the economic provisions of a marriage dissolution. Harold contends the trial court erred: (1) in dividing the parties' marital assets in an inequitable manner; and (2) that the trial court's award of alimony was unduly burdensome. We affirm as modified.

Marlys contends the unequal distribution of property was equitable because she contributed nearly all of her $30,000 inheritance into paying off the original purchase loan and into the costs of remodeling over the years 1964 through 1969.

The standard of review which we employ is de novo. Iowa R. App. P. 4. Thus, we have a duty to examine the entire record and adjudicate anew rights on the issues of property presented In re Marriage of Steenhoek, 305 N.W.2d 448, 452 (Iowa 1981).

Our review of the trial court's division of the parties' marital assets is governed by well-settled principles. The factors to be considered in ascertaining

whether the trial court's determination was appropriate are set forth in Iowa Code section 598.21(1) (1989). The crucial inquiry upon review of a dissolution decree is whether the distribution is equitable given the particular circumstances of the case. In re Marriage of Wallace, 315 N.W.2d 827, 830 (Iowa App. 1980).

Under Iowa law, a transfer of property into joint tenancy where one party furnishes all of the consideration is presumed to be a gift to the other party of one-half interest in the property. Frederick v. Shorman, 259 Iowa 1050, 1056, 147 N.W.2d 478, 482 (1966); In re Marriage of Butler, 346 N.W.2d 45, 47 (Iowa App. 1984). This presumption is rebuttable. Butler, 346 N.W.2d at 47.

We believe the reasoning in Shorman and Butler to be persuasive in this case. It is clear the petitioner made these inherited funds available to the marital unit for its unrestricted use and benefit. There is no evidence in the record to rebut the presumption the transfer of the funds was a gift. The record indicates the inheritance money also went towards other expenses such as family living expenses and motor vehicles. We are not able to ascertain from the record exactly how much of the inheritance was invested in the homestead. Accordingly, we agree with the appellant's contention the division of the marital assets was inequitable.

Taking into consideration the appellee's inability to make a lump sum cash payment, we modify the decree to

provide appellee has the option of either: (1) selling the house and paying one-half of the proceeds from the sale to the appellant; or (2) paying the appellant $3,453 over the next three years in equal monthly installments of $95.92 plus interest at an annual percentage rate of 10%. We also award the twenty-one-foot Holiday travel trailer to Harold.

The trial court awarded Marlys alimony of $500 per month to be reviewed on September 24, 1993, the date of her expected retirement. Harold claims the trial court's award of alimony was excessive as to its amount and the duration.

The criteria governing the granting of alimony are set forth in Iowa Code section 598.21(3) (1989). When the reviewing court determines the appropriateness of alimony on appeal, it considers the earning capacity of each party and their present standards of living and ability to pay balanced against their relative needs. In re Marriage of Harvan, 406 N.W.2d 450, 452 (Iowa App. 1987). "When we look to the amount of permanent alimony a payee spouse should receive, . . . we must consider not simply present income, but his or her earning capacity." In re Marriage of Wegner, 434 N.W.2d 397, 399 (Iowa 1988). "[B]oth parties, if they are in reasonable health, need to earn up to their capacities in order to pay their own present bills and not lean unduly on the other party for permanent support." Id.

We believe the reasoning in Wegner to be persuasive in this case. Though Marlys's earning capacity is not great,

she still needs to attempt to reach that capacity whether through obtaining more jobs painting or in another field of employment.

We modify the decree to provide the alimony of $500 per month shall remain only until the date of Harold's retirement at age 65, at which time the alimony shall be reduced to $200 per month. The payments shall be redetermined, as provided by the trial court, at the time of Marlys's retirement. Alimony shall be payable until such time as Marlys shall remarry or at the death of either party, at which time all alimony obligations shall cease. Except as modified herein, we otherwise affirm the trial court.

Each party shall pay his or her own attorney fees on appeal. Costs of appeal are charged to appellee.

AFFIRMED AS MODIFIED.